



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 17, 1998

Ms. Linda Wiegman  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR98-3172

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 120465.

The Texas Department of Health ("department") received a request for "a completed report of evaluation/investigation" conducted by the department concerning two specified entities. In response to the request, you submit to this office for review the information you assert is responsive. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

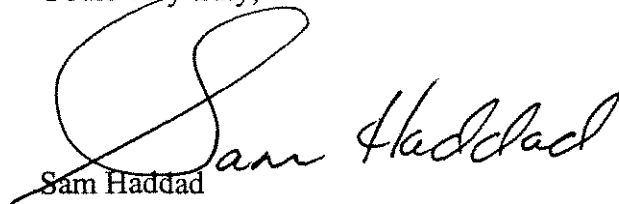
Along with the responsive information, you have submitted a Plaintiffs' Original complaint pending in the United States District Court for the Southern District of Texas. *Affiliated Professional Home Health Care Agency, et al. v. Donna Shalala et al.*, No. G-97-623 (S.D. Tex.). This action alleges violations of the plaintiffs' constitutional rights of equal

protection and due process. The department has thus met its burden in establishing that litigation is pending. After reviewing the submitted materials, we further conclude that the requested information relates to the pending litigation. In this instance, you have made the requisite showing for purposes of section 552.103(a) that the submitted information is related to pending litigation. Therefore, the submitted record may be withheld under section 552.103(a).

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue. Because absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Finally, the applicability of section 552.103(a) ends once the litigation has been concluded.<sup>1</sup> Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

  
Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref.: ID# 120465

Enclosure: Submitted document

cc: Mr. Jose R. Lopez, II  
Law Offices of Jose R. Lopez, II  
3700 Buffalo Speedway, Suite 700  
Houston, Texas 77098  
(w/o enclosure)

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<sup>1</sup>However, you may not release confidential information even after the litigation has concluded. See Gov't Code § 552.352 (distribution of confidential information is criminal offense).